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MEMORANDUM FOR: Joseph T. Kammerer  
Chief Financial/Administrative Officer

FROM: Monica Medina *[Signature]*  
General Counsel

SUBJECT: Environmental Compliance Liability

By Memorandum to Jay Johnson you requested a written opinion describing the civil and criminal liabilities associated with environmental compliance responsibilities of NOAA personnel. You also requested that the opinion discuss the liability associated with technical advice/consultation offered to Line and Staff offices by the environmental compliance staff of the Office of Finance and Administration (OFA).

This memorandum has been prepared in response to your request for a written opinion. The first section of the memorandum describes general civil and criminal environmental compliance liabilities as they affect individuals and organizations. The second section relies on the Agency's organizational structure as it currently exists to discuss briefly the issue of liability associated with technical advice from the Office of Environmental Compliance/OFA. The third section addresses the issue of legal representation of Federal employees in environmental criminal actions.

***I. Liability for Environmental Compliance***

The criminalization of environmental law is primarily an American phenomenon. Its basis is predicated on the concept of enforcement of environmental laws as an indispensable feature of effective environmental regulation. Over the last twenty-five years, Congress and the Environmental Protection Agency ("EPA") have built a pervasive system of governmental controls aimed at regulating wastes and safeguarding the environment. In the early seventies, enforcement primarily emphasized civil and administrative penalties, cleanup orders, pollution control technology and supplemental remedial projects. Until the early eighties, there was no organized environmental crimes program at the Federal level.

In 1982, the Department of Justice and the EPA moved to establish formal environmental crimes divisions. Since then, Federal and state prosecutors have increasingly threatened and imposed criminal sanctions, including million dollar fines and incarceration. This trend continues and is on the rise.



Environmental regulations from both the criminal and civil perspective are designed to protect human health and the environment from exposure to hazardous substances. Sharing this enforcement objective, there is little, if any, difference among the essential elements of administrative, civil, and criminal charges. With the exception of a few felony provisions in specific Federal statutes, there is no minimum quantitative requirement to differentiate which illegal discharge or activity should be prosecuted civilly or criminally, or between what constitutes an infraction versus a felony. As a result, essentially every violation of a civil rule or permit in the environmental arena is technically subject to criminal prosecution.

#### *A. The Standards of Liability*

The standard of criminal liability established and in effect since the early seventies is one of "knowing intent to commit the act." This standard does not require an intent to violate the law or commit a crime, only that the defendant intended to commit a certain act or had knowledge of the act. This standard is easily satisfied by circumstantial evidence that the discharger knew it was dealing with a material that could harm humans or the environment. Together with the presumption that considerable knowledge of waste handling is incumbent on individuals working with hazardous substances, the threshold of liability for environmental violations can be met where the individual "knew or should have known" that the material being handled could injure humans or the environment. (*United States v. International Minerals and Chemicals Corporation*, 402 U.S. 558, (1971)) (emphasis added). This level of general intent is significantly different and much easier to prove than the typical intent, or mens rea, associated with other crimes.

Throughout the eighties, Congress gradually clarified the scope of the environmental criminal provisions by upgrading crimes from misdemeanors to felonies and providing for greater fines and longer terms of imprisonment. The standard of care that emerged from these changes is one of "knowing endangerment." The "knowing endangerment" provisions of environmental crimes statutes are designed to address particularly offensive conduct that directly threatens human life. It is intended for application at facilities generating highly toxic substances where the defendant knowingly violates an environmental standard, and where the defendant knew at the time of violation that they had placed another person in imminent danger of death or serious bodily injury. Proof only of risk of harm, not actual harm, is required for conviction. Convictions carry prison terms of up to 15 years and fines to \$250,000.00.

In the first major conviction for knowing endangerment, the Department of Justice argued successfully that it could show culpable knowledge through deliberate avoidance, reckless disregard, or lack of due diligence, that the corporation's knowledge could be inferred from its organizational indifference to violations, and that circumstantial evidence could be used to show an individual defendant's knowledge based on their responsible positions or on the particular regulatory scheme. As a result, the "knowing" element of even these provisions was again reduced to "should have known." [See *United States v. Protex Industries, Inc.*, 874 F.2d 740 (10th Cir. 1989)].

## ***B. Investigative and Prosecutorial Discretion***

The deciding factor in any environmental prosecution is the government's exercise of discretion whether to pursue an environmental violation civilly or criminally. EPA is tasked with the first steps of investigation and referral. Under a 1982 memorandum issued by EPA, criminal referrals are to be confined to "the most serious cases of environmental misconduct." The memorandum identifies five criteria to be addressed in determining whether a criminal referral is appropriate. The criteria are:

- \* *the scienter requirement*- criminal prosecution is normally limited to cases where the prospective defendant has "guilty knowledge" or intent to violate the law;

- \* *the nature and seriousness of the offense*-this factor focuses on the "extent of environmental contamination or human health hazard" resulting from the prohibited conduct. It considers the duration of the conduct, toxicity of the pollutants, proximity to humans, quality of the receiving media, and "public sentiment supporting strong enforcement action." It also considers the impact on EPA's regulatory functions, e.g., falsification of reports, tampering with monitoring equipment;

- \* *the need for deterrence*- this factor primarily targets particularly deliberate offenses or those that result in serious environmental contamination or human health hazard;

- \* *compliance history*- repeated environmental violations may trigger criminal enforcement to achieve effective individual deterrence; and

- \* *the need for simultaneous civil or administrative enforcement actions*- this factor addresses cases of noncompliance that pose ongoing risks to the environment or human health that must be addressed in a separate civil action for an injunction.

The memorandum also sets out EPA's investigative priorities under various statutes. Absent minor program modifications presented in additional memorandum in 1987 and 1990, these criteria were not further refined until 1994 when the EPA's Criminal Investigations Division attempted to differentiate the most significant and egregious cases from those in which civil or administrative action should be pursued. The two new, additional criteria are:

- \* *"Significant environmental harm"* - This new standard broadened the existing analysis of the nature and seriousness of the offense (above) to include threatening situations as well as actual harm.

- \* *"Culpable conduct"* - This standard further defined the need for deterrence (above) to include investigation of repeated violations, deliberate misconduct, concealment of misconduct or falsification of required records, tampering with monitoring or control equipment, and operating without required permits.

Using this guidance, if EPA determines that certain conduct amounts to a criminal violation, it will refer the case to the Department of Justice for prosecution. Justice generally bases its decisions to bring environmental criminal cases on the *Federal Principles of Prosecution* which provides that the government will decline to prosecute if the evidence does not support a reasonable probability of conviction. Even where the evidence is sufficient to convict, a prosecutor may decide not to bring a case if no substantial Federal interest would be served, or if civil or administrative remedies would provide an adequate noncriminal alternative to prosecution.

In 1991, Justice issued its only guidance regarding prosecutorial discretion in environmental cases. In delineating the scope of the guidance, the Justice Department describes the policy as "the current general practice of the Department in making criminal prosecutive and other decisions..." As such, it represents the clearest articulation of the Department's framework within which it decides to prosecute or not. The guidance, entitled *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator*, sets forth four main factors to be considered when evaluating a case for prosecution. Those factors are:

- \* *Voluntary disclosures*- where consideration is given to whether the person came forward promptly after discovering the noncompliance, and to the quantity and quality of information provided;

- \* *Cooperation*- where consideration is given to the degree and timeliness of cooperation by the person;

- \* *Preventative Measures and Compliance Programs*- where consideration is given to the existence and scope of any regularized, intensive, and comprehensive environmental compliance program; and

- \* *Additional factors*- such as pervasiveness of noncompliance, internal disciplinary action as an integral part of a comprehensive environmental compliance program, and subsequent compliance efforts.

In general, Justice's environmental criminal prosecutions have concentrated on persons operating outside the regulatory or permit system including those seeking to falsify information or conceal violations. Their policy therefore emphasizes the factor of "willful, deliberate, rational, and premeditated violations." They have formally stated that they will bring cases against individuals who are fully knowledgeable of the regulatory requirements but fail to follow them.

Although not committed to writing, Justice also has a long-standing policy of prosecuting the highest ranking responsible individual in a company for the violation. Recent court cases support this policy and establish that supervisors with environmental responsibilities have a positive duty to seek out and remedy violations which occur and to implement measures that will insure future violations do not occur. Thus, even if "junior level" employees were the ones who made the



"hands on" wrongful act, current enforcement strategy indicates that those junior employees could be offered some form of limited immunity from prosecution in exchange for testimony against senior officials who either directed the conduct or knew of it and failed to act to stop it.

Finally, the fact that no Agency funding is available to address or redress environmental incidents or requirements is not a defense or mitigating factor in the prosecutorial context. It is therefore incumbent on environmental compliance employees and managers to submit well-supported funding requests sufficient to meet their obligations. Violations resulting from unfunded requests could lead to civil, organizational penalties. However, an individual's failure to request or support funding could ultimately be found to constitute indifference leading to criminal liability.

The following cases describe situations where individuals were convicted of environmental crimes:

United States v. Dee (the Aberdeen case). This prosecution involved three senior Department of Army employees who were indicted and convicted for violations of the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA). The court found the three liable based on their responsibilities to obtain permits and supervise hazardous waste storage and disposal and their failure to request funding and implement an appropriate plan.

United States v. James Lewis. A civilian employee of the US Army was convicted of improperly storing radioactive materials in unmarked drums. The employee was responsible for the disposal of the materials but never made arrangements for their removal.

United States v. David Carr. Mr. Carr, a civilian foreman of the artillery range at Ft. Drum, New York, was convicted of two violations of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) based on his failure to report the release of a hazardous substance in to the environment. Mr. Carr had directed subordinates to dispose of several truckloads of substances in to a shell crater on the artillery range. When seeping occurred, Mr. Carr directed his subordinates to fill in the hole.

United States v. Cletus Bond. A Navy civilian employee in charge of his installations' auto repair facility was convicted of negligent discharge of pollutants in violation of the CWA. Despite knowing better, he allowed the routine dumping of radiator fluid in to a storm drain on the facility.

United States v. Richard Pond. Mr. Pond, an Army civilian and manager of the wastewater treatment plant at Ft. Meade, Maryland, was convicted on eight counts of making false statements on National Pollution Discharge Elimination System reports.

United States v. John Curtis. Mr. Curtis was a civilian Fuel Division officer assigned to a Naval Air station in Adak, Alaska. He was convicted of negligently and knowingly violating the CWA based on his knowledge of a jet fuel spill and his deliberately ignoring the spill and its

associated ongoing discharge.

United States v. Woodward. Mr. Woodward was convicted of falsifying documents regarding the disposition of hazardous wastes and improperly disposing of those wastes. He had placed the material in a dumpster and then tried to forge a signature certifying that the waste had been properly disposed of.

United States v. Ward. Mr. Ward was the owner of a small company who was held personally liable for cleanup expenses where he directed a waste disposal contract to a personal friend (who was neither qualified nor certified to handle the waste stream products). The wastes (PCBs) were disposed of in violation of the Toxic Substances Control Act (TSCA) when they were sprayed along a highway from a truck.

United States v. Brittain. The utilities director of a small city was convicted of 18 felony counts of submitting false data on monitored effluent data in violation of the Federal Water Pollution Control Act.

United States v. Hayes International Corp. Both the corporation and one of its employees were charged with knowingly transporting hazardous waste to an unpermitted facility. Through circumstantial evidence, the government proved that the employee knew that the facility was not recycling the waste delivered to it.

United States v. Northeastern Pharmaceutical & Chemical Co., Inc. A company president was held liable as an "operator" where he was responsible for all waste removal operations for the company, even though he did not personally participate in the improper arrangements for disposal of hazardous substances that led to criminal charges.

United States v. Hoflin. Mr. Hoflin, the Director of Public Works for a city in Washington state, instructed his employees to bury drums containing paint and sewage after receiving warnings that such disposal would violate certain permits.

United States v. Irby. Mr. Irby was the senior engineer/manager of a Publicly-Owned Treatment Works (POTW) who was convicted of making false statements on discharge monitoring reports. He was sentenced to 32 months in jail.

United States v. Demi. Mr. Demi was a plant production manager who was convicted of five RCRA storage and disposal violations and sentenced to 40 months in jail. He had ordered employees to bury hazardous waste in a pit behind the plant and to discharge hazardous waste in to an unlined lagoon.

## ***II. Liability within NOAA***

Absent a specific set of facts related to an environmental incident (e.g., what the nature of the

harm was and which portion of the Agency had responsibility for managing the incident), the question of the liability associated with advice given by the OFA is extremely difficult to answer. Under NOAA's current organizational structure, and adhering to the principles set forth in the preceding section, line office violations occurring in the field could potentially lead to charges against facility directors and line office directors. Charges could also be brought at a much higher level within the Agency if Justice felt that NOAA had failed to promote a comprehensive environmental compliance program (including internal discipline and accountability) and the violation was significant. In any event, the individual charge must have some level of actual authority to direct or control the activity.

Given the diffuse nature of NOAA's current program and a lack of specific facts, it is difficult to predict much further. The principle to bear in mind is that the prosecutor will move as far up the chain of command as possible. In fact, given the dissipated structure of the program as it currently exists, it is quite probable that a regulator would in fact reach beyond the line offices and ASC directors in an attempt to highlight the lack of a rational, comprehensive program as a contributing factor to the violation.

Under a structured, centralized environmental compliance program, environmental responsibility and liability would *generally* be directed to the management and staff of this office. This would pertain, however, only to those instances where a field or line office acted on the advice or direction of the compliance program office, or where authority to act had been delegated to the compliance program. If personnel in a field or line office acted (or failed to act) without compliance guidance (or in contravention of it), the liability would again reside with the chief decision-maker in that chain of command. Again, prosecutorial reach will extend as far along the decision chain as possible and will include those who *knew or should have known*. It is therefore imperative that all personnel faced with compliance issues educate themselves about environmental requirements so they may make informed decisions and thereby act within the confines of the law.

### ***III. Federal Employees Charged with Criminal Environmental Violations***

A Federal employee does not enjoy any immunity from violating criminal laws, environmental or otherwise. By way of specific statutory example, and concurrent with the overall erosion of the shield of sovereign immunity, the Federal Facilities Compliance Act (FFCA) of 1992 specifically includes criminal prosecution of Federal employees within the reach of criminal prosecution. As stated in the FFCA:

"An agent, employee or officer of the United States shall be subject to any criminal sanction (including but not limited to, any fine or imprisonment) under *any* Federal or State solid or hazardous waste law..." (Emphasis added)

When a Federal employee undertakes an activity which results in an environmental violation, that action is considered illegal by environmental regulators. No personal conduct that violates

Federal environmental criminal law will ever fall within the scope of Federal duties.

The Office of General Counsel/NOAA represents the Agency and can represent employees only for activities which are conducted within the scope of their employment. If a criminal environmental investigation or proceeding is initiated, the Agency has a responsibility to defend the Agency, and the potential misconduct of an individual employee must necessarily be addressed independently. To avoid potential conflicts of interest, the employee is referred to the Department of Justice for potential representation.

The regulations governing Justice representation are found at 28 U.S.C. 516-519. Generally, the Department of Justice will not represent any Federal employee named in a criminal investigation or indicted on criminal charges based on the same principal that illegal conduct is outside the scope of Federal employment.

The criteria used to evaluate whether representation will be provided are:

- \* the Federal employee was acting within the scope of his or her Federal duties;
- \* he or she has been sued civilly, either in an official or individual capacity; and
- \* it is in the best interests of the United States to defend the individual.

If a state criminal proceeding is commenced, Justice will consent to defend or reimburse a Federal employee in cases where the allegation is based on negligent conduct arguably within the scope of the Federal employee's duties. If a common law tort claim is brought by a private citizen against a Federal employee, a 1988 amendment to the Federal Tort Claims Act (28 U.S.C. 2679) provides an exclusive and similar remedy. The amendment provides that in tort claims based on the actions of Federal employees within the scope of their employment, the United States is "substituted" in the place of the individual defendant being sued by requiring the defendant to follow certain guidance. Through this "substitution", the Federal employee whose action was within the scope of their Federal duties will essentially be represented by the United States. The amendment does not apply, however, to constitutional claims or claims based on a Federal statute.

In any action where it appears that some kind of conflict of interest is possible between the interests of the United States and the Federal employee, or where a determination is made that it is not in the interests of the United States to defend the Federal employee, Justice, like the employing agency, is precluded from representing the individual. In this instance, the individual must consider whether or not to hire private counsel. If the employee is later cleared of charges or no indictment is sought, the employee may seek reimbursement through the Department of Justice for legal expenses they have incurred defending themselves.

Finally, under the dual sovereignty doctrine, both the Federal and state governments may independently prosecute a person for environmental crimes without violating the Double Jeopardy or Due Process Clauses of the United States Constitution. This factor will be weighed by Justice in the determination of representation of Federal employees. In instances where state criminal



claims are mirrored by parallel Federal proceedings, representation will likely be withheld.

#### *IV. Summary*

Because protection of human health is the paramount focus of both civil and criminal provisions of environmental statutes, and because the criminal standard has been established at the "knew or should have known" level, discerning the distinction between civil and criminal penalties can be difficult. While much emphasis is placed on prosecutorial and enforcement discretion, there are steps that individuals can take to ensure that they are not criminally prosecuted. In the first instance, find out what laws and regulations are applicable and follow them. If the applicability or implementation of those laws is confusing, seek assistance through a Regional Environmental Compliance Officer or the Office of General Counsel. If a violation or a release does occur, report it immediately and cooperate fully with the enforcing/regulatory agency. Do not cover up illegal acts or tamper with monitoring equipment. Organize environmental compliance needs and priorities, document and support compliance budget requests and ensure that the funds received are applied to the appropriate projects.

In essence, by addressing environmental compliance responsibilities with the same level of care and diligence afforded any other task, criminal liability can be avoided.